S E R V E D
January 22, 2009
FEDERAL MARITIME COMMISSION

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

DOCKET NO. 08-05

CITY OF LOS ANGELES, CALIFORNIA, HARBOR DEPARTMENT OF THE CITY OF LOS ANGELES, BOARD OF HARBOR COMMISSIONERS OF THE CITY OF LOS ANGELES, CITY OF LONG BEACH, CALIFORNIA, HARBOR DEPARTMENT OF THE CITY OF LONG BEACH, AND THE BOARD OF HARBOR COMMISSIONERS OF THE CITY OF LONG BEACH - POSSIBLE VIOLATIONS OF SECTIONS 10(b)(10), 10(d)(1) AND 10(d)(4) OF THE SHIPPING ACT OF 1984

MEMORANDUM AND ORDER ON PETITIONS FOR LEAVE TO INTERVENE PURSUANT TO RULE 502.72 and MOTION FOR STAY

By Order of Investigation and Hearing dated September 24, 2008, the Commission commenced an investigation into the activities of the City of Los Angeles, California; Harbor Department of the City of Los Angeles; the Board of Harbor Commissioners of the City of Los Angeles; City of Long Beach, California; Harbor Department of the City of Long Beach; and the Board of Harbor Commissioners of the City of Long Beach for possible violation of sections 10(b)(10), 10(d)(1), and 10(d)(4) of the Shipping Act of 1984. *City of Los Angeles, California, et al., - Possible Violations of Sections 10(b)(10), 10(d)(1) and 10(d)(4) of the Shipping Act of 1984*, FMC No. 08-05 (Sept. 24, 2008) (Order of Investigation and Hearing). The Commission designated the Commission's Bureau of Enforcement (BOE) as a party and ordered that other persons having an interest in participating in this proceeding file petitions for leave to intervene in accordance with Rule 72 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.72. *Id.* at 10.

Pursuant to the Order, the following entities have filed petitions to intervene: the Intermodal Motor Carriers Conference of the American Trucking Association, Inc.; the Owner-Operator Independent Drivers Association, Inc.; the Natural Resources Defense Council, Sierra Club, and Coalition for Clean Air (jointly); and the National Association of Waterfront Employers. Respondents have filed oppositions to the petitions filed by Intermodal Motor Carriers Conference of the American Trucking Association, Inc., the Owner-Operator Independent Drivers Association,

Inc., and the National Association of Waterfront Employers. BOE did not reply to the petitions. For the reasons stated below, I grant the petitions for leave to intervene.

Respondents have filed a motion to stay this proceeding until the "Commission and [BOE] comply with the National Environmental Policy Act . . . and the Commission's rules . . . which require that the Commission begin preparation of an Environmental Impact Statement . . . when it issues an order of investigation in a proceeding that may have a significant impact upon the environment." (Motion for Stay at 2.) For the reasons stated below, I deny the Motion for Stay.

BACKGROUND

I. THE PORTS AT SAN PEDRO BAY.

Respondent Port of Los Angeles is a self-supporting department of respondent City of Los Angeles, California. The Port of Los Angeles is under the control of a five-member Board of Harbor Commissioners appointed by the Mayor of Los Angeles and approved by the City Council, and is administered by an executive director. The Port of Los Angeles is the largest container port in the United States with a loaded container volume of 5.7 million twenty-foot equivalent units (TEUs) for 2007. This memorandum and order refers to respondents City of Los Angeles, Harbor Department of the City of Los Angeles, and the Board of Harbor Commissioners of the City of Los Angeles collectively as the Port of Los Angeles.

Respondent Port of Long Beach has an administrative structure similar to the Port of Los Angeles. The Port of Long Beach is a public agency managed and operated by respondent City of Long Beach Harbor Department. The Port of Long Beach is governed by the Long Beach Board of Harbor Commissioners, whose five members are appointed by the mayor of Long Beach and confirmed by the City Council, and administered by an executive director. The Port of Long Beach is the second largest port in the United States with a loaded container volume of more than 4.9 million TEUs for 2007. This memorandum and order refers to respondents City of Long Beach, California, Harbor Department of the City of Long Beach, and the Board of Harbor Commissioners of the City of Long Beach collectively as the Port of Long Beach.

The Port of Los Angeles and the Port of Long Beach are located next to each other in San Pedro Bay and together are referred to as the San Pedro Bay Ports or the Ports. The Ports are marine terminal operators (MTOs) as defined by the Shipping Act.[1] While the Ports compete for business, they cooperate on infrastructure projects and environmental issues pursuant to agreements filed with the Commission. Together they would constitute the fifth largest container port in the world.

---

[1] "The term 'marine terminal operator' means a person engaged in the United States in the business of providing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier, or in connection with a common carrier and a water carrier subject to subchapter II of chapter 135 of title 49." 46 U.S.C. § 40102(14).

In June 2006, the cities of Los Angeles and Long Beach entered into a Port Infrastructure and Environmental Programs Cooperative Working Agreement. The Agreement became effective on August 10, 2006. *See* FMC Agreement No. 201170.

> The purpose of the Agreement is to promote cooperation, openness and joint action through means of discussion, consultation, development of consensus and agreement between the Cities of Los Angeles and Long Beach for the establishment and implementation of programs and strategies to improve port-related transportation infrastructure in order to increase cargo movement efficiencies and decrease port-related air pollution emission in the San Pedro Bay area.

Id. Article II.

On November 20, 2006, the Ports approved the San Pedro Bay Ports Clean Air Action Plan (CAAP). The CAAP is a broad effort to reduce the health risks posed by air pollution from port-related ships, trains, drayage trucks, terminal equipment, and harbor craft by at least 45 percent in five years. To achieve that result, each port adopted a Clean Truck Program (CTP) to address, *inter alia*, air pollution caused by truck that transport containers to and from the Ports. Each port scheduled its CTP to become effective on October 1, 2008.

Central to each port's CTP is a system to control truck access to the terminals through the issuance of port concessions to licensed motor carriers (LMCs). The CTP for each port provides that after October 1, 2008, entry to the terminals will be limited to LMCs that have a concession agreement (concessionaires). LMCs serving both ports must have a separate concession from each port. To become a concessionaire, an LMC must file an application with a $2,500 fee for the Port of Los Angeles and $250 for the Port of Long Beach, and pay an annual fee of $100 per truck in both ports. The application must set forth a plan that meets the following requirements:

- Establishes an appropriate maintenance plan for trucks used at the port;
- Ensures that all trucks comply with safety, regulatory and security requirements;
- Ensures that drivers have obtained their Transportation Worker Identification Credential;
- Consents to safety and security searches of trucks when entering and leaving the port and while on port property;
- Maintains prescribed insurance levels;
- Equips trucks with prescribed devices to allow for the electronic reading of certain data concerning the truck;
- Ensures compliance with parking ordinances;
- Agrees to hiring preferences for drivers with port experience; and
- Agrees to travel only on specified truck routes established by local municipalities or the Ports.

Submission of an application does not guarantee an award of a concession. There are no published criteria or standards governing the granting or denial of concessions. Both ports require the LMC to register its drayage vehicles in a Drayage Truck Registry (DTR) identifying the vehicle and all of its pertinent details, including the model year of the truck and its engine. Only vehicles registered in the DTR will be permitted entry to the terminals.

As part of their CTPs, each port adopted a truck ban by which trucks older than model year 1989 will be prohibited from entering terminal premises on and after October 1, 2008. Thereafter, the program progressively bans trucks that do not meet 2007 federal Environmental Protection Agency (EPA) emission standards by January 1, 2012. Each port adopted a truck replacement program to assist truckers to purchase or upgrade to 2007-compliant trucks through grants and lease-to-own plans. State and port funds as well as funds derived from a Clean Truck Fee will be used to finance the truck replacement programs through a Clean Truck Fund maintained by each port.

Beginning October 1, 2008, a fee of $35 per loaded TEU, or $70 per FEU, will be collected from the beneficial cargo owner of each container entering or leaving the terminals by truck. Containers entering or leaving the Ports by rail or moving between terminals at the Ports are not subject to the fee. Both ports will exempt collection of the fee where the truck hauling the container was privately financed, is compliant with the 2007 federal EPA standards, and meets certain conditions. Each port established slightly different requirements with respect to eligibility for the exemption depending on whether the truck's fuel is diesel or an alternative fuel such as LNG; when the vehicle was purchased; whether an old truck was scrapped; and whether the truck was purchased with program funds. Marine terminal operator tenants of the Ports are responsible for verification of authorization to enter the terminals and collection of the Clean Truck Fee. Provisions governing these requirements are published in the respective tariffs of the Ports.

There are certain differences between the CTPs of the two ports:

EMPLOYEE ONLY DRIVERS:

The Port of Los Angeles CTP requires that all concessionaires provide port service only with company-employee drivers. This requirement will be phased in over a five-year period beginning January 1, 2009. By December 31, 2013, all drivers for concessionaires at the Port of Los Angeles must be company employees. Independent owner-operators will not be permitted entry to the container terminals. The Port of Long Beach has no similar mandate and will permit concessionaires to continue to provide service with either employee drivers, independent owner-operators, or a combination of both, as is currently allowed.

OFF-STREET PARKING:

The Port of Los Angeles CTP requires that all concessionaires establish a plan that limits truck parking to off-street locations when the trucks are not in the terminal. No on-street parking will be allowed for trucks not in service. The Port of Long Beach, on the other hand, requires

applicants to submit a parking plan that demonstrates either the availability of off-street parking or legal on-street parking.

FINANCIAL STATEMENTS:

The Port of Los Angeles CTP requires applicants to submit financial statements and a statement of business experience at the port, in drayage service, and with owner-operators or driver employees, together with references to verify this information. The Port of Long Beach does not have a similar requirement.

THE PORT OF LOS ANGELES INCENTIVE PROGRAM:

On August 21, 2008, the Port of Los Angeles adopted two additional incentives to encourage companies operating 2007 or newer compliant trucks to become concessionaires and commit to a stated minimum of service at the Port of Los Angeles. One incentive offers a cash payment of $20,000 for each 2007 EPA-compliant truck that is privately funded and committed to service in the Port drayage market at a minimum frequency of six trips per week for five years. Carriers interested in participating were required to submit a letter of interest by September 19, 2008, stating the number of eligible trucks operated, the number to be initially committed to port service, and the number to be added monthly. The other incentive provides for a cash payment of $10 per dray by a 2007 EPA-compliant truck, if the truck achieves a minimum target of 600 qualified drays per year in and out of the Port of Los Angeles and the Port of Long Beach, and 300 of those drays are for cargo passing through the Port of Los Angeles. There is a per-truck limit on this incentive of $10,000 for the year commencing October 1, 2008. Incentive payments for both programs will be made from the Clean Truck Fund and other port funds. Successful applicants for the payment will be selected at the sole discretion of the port staff.

II. ORDER OF INVESTIGATION AND HEARING.

The Federal Maritime Commission (Commission) is responsible for enforcing the requirements of the Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998 (Shipping Act). 46 U.S.C. §§ 40101-41309. As the Ports are marine terminal operators, their actions, to the extent they impact international transportation, are subject to the Commission's jurisdiction and, in particular, to the requirements of section 10 of the Shipping Act.[2] Section 10(d)(1) requires MTOs to establish, observe, and enforce just and reasonable regulations and

[2] On October 14, 2006, the President signed a bill reenacting the Shipping Act as positive law. The bill's purpose was to "reorganiz[e] and restat[e] the laws currently in the appendix to title 46. It codifies existing law rather than creating new law." H.R. Rep. 109-170, at 2 (2005). Sections 10(b)(10), 10(d)(1), and 10(d)(4) are now codified at 46 U.S.C. §§ 41106(3), 41102(c), and 41106(2) respectively. As exemplified by the Order of Investigation and Hearing, the Commission has continued to cite provisions of the Shipping Act by their sections in the Act's original enactment, references that are well-known in the industry. I follow that practice in this memorandum.

practices relating to or connected with receiving, handling, storing, or delivering property. 46 U.S.C. § 41102(c). Section 10(d)(4) provides that an MTO may not give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person. 46 U.S.C. § 41106(2). Section 10(b)(10) provides that an MTO may not unreasonably refuse to deal or negotiate. 46 U.S.C. § 41106(3).

As the Order of Investigation and Hearing makes clear, the Commission has not expressed a concern with the CTPs in their entireties, but has authorized an investigation into limited aspects of the plans:

A. The provision in the CTP of the Port of Los Angeles requiring concessionaires to use only employee drivers and the correlative ban on independent owner operators providing drayage service at the Port (Order of Investigation and Hearing at 7, 8 (¶¶ 1, 2, and 7));

B. The provision in the CTP of the Port of Los Angeles that would result in payments to certain selected motor carriers as incentive to provide drayage service at the port, but not to other motor carriers (Order of Investigation and Hearing at 7 (¶ 3));

C. The provision in the CTP of the Port of Los Angeles denying access to terminal facilities to drayage carriers unless they have port-approved arrangements to park their vehicles on off-street premises (Order of Investigation and Hearing at 8 (¶ 4));

D. The provision in the CTPs of the Port of Los Angeles and the Port of Long Beach exempting from the Clean Truck Fee those beneficial cargo owners whose cargo is moved by privately financed 2007 compliant trucks, while imposing fees on those beneficial cargo owners whose cargo is moved by publicly financed 2007 compliant trucks and trucks manufactured between 1989 and 2006 (Order of Investigation and Hearing at 8 (¶ 5)); and

E. The provision in the CTPs of the Port of Los Angeles and the Port of Long Beach requiring motor carriers wanting to provide container drayage service at the Ports to submit an application for a concession without having established standards or criteria by which the application will be judged (Order of Investigation and Hearing at 8 (¶ 6)).

In the event that the investigation results in a finding that the Port of Los Angeles and/or the Port of Long Beach violated the Shipping Act, the Commission contemplates the following remedies:

8. Whether, in the event one or more violations of section 10 of the Shipping Act are found, civil penalties should be assessed and, if so, the identity of the entities against whom the penalties should be assessed and the amount of the penalties to be assessed;

9. Whether, in the event violations are found, appropriate cease and desist orders should be issued.

Order of Investigation and Hearing at 8-9 (¶¶ 8 and 9).

PETITIONS TO INTERVENE

As a preliminary matter, I note that this is one of several proceedings concerning the Ports' Clean Trucks Programs. The American Trucking Association commenced an action against the Ports in the United States District Court for the Central District of California seeking to enjoin the implementation of the CTPs. *American Trucking Assoc., Inc. v. City of Los Angeles*, No. CV 08-04920 CAS (Ctx) (C.D. Cal. Sept. 9, 2008) (order denying motion for preliminary injunction), *appeal docketed*, No. 08-56503 (9th Cir. Sept. 11, 2008). The Natural Resources Defense Council, Sierra Club, and Coalition for Clean Air commenced an action in the Central District of California seeking to enjoin the Commission from taking any action regarding the CTPs prior to preparing an environmental assessment or environmental impact statement as these entities contend is required by the National Environmental Protection Act (NEPA), 42 U.S.C. §§ 4321, *et seq.*, and the Administrative Procedure Act (APA), 5 U.S.C. §§ 701 *et seq*, or a Statement of Energy Impact as required by the Energy Policy and Conservation Act (EPCA), 42 U.S.C. § 6263, and the APA. *Natural Resources Defense Counsel v. Federal Maritime Comm'n*, No. CV 08-07436 (C.D. Cal. Nov. 10, 2008) (complaint filed). The Commission commenced an action against the Ports in the United States District Court for the District of Columbia after it determined under section 6 of the Shipping Act that the Ports' Cooperative Working Agreement for implementing security and pollution related programs is likely to result in an unreasonable decrease in transportation service or an unreasonable increase in transportation costs. *Federal Maritime Comm'n v. City of Los Angeles, California, et al.*, 1:08-cv-01895-RJL, (D.D.C. Oct. 31, 2008) (complaint filed).

I. STANDARD FOR PETITIONS FOR LEAVE TO INTERVENE.

Rule 72 of the Commission's Rules of Practice and Procedure governs petitions for leave to intervene. 46 C.F.R. § 502.72. Pursuant to the Rule, intervention as a matter of right will only be granted upon a clear and convincing showing that:

> (I) The petitioner has a substantial interest relating to the matter which is the subject of the proceeding warranting intervention; and
>
> (ii) The proceeding may, as a practical matter, materially affect the petitioner's interest; and
>
> (iii) The interest is not adequately represented by existing parties to the proceeding.

46 C.F.R. § 502.72(b)(1). Intervention may be granted as a matter of Commission discretion if the petitioner shows that:

> (I) A common issue of law or fact exists between the petitioner's interests and the subject matter of the proceeding; and
>
> (ii) Petitioner's intervention will not unduly delay or broaden the scope of the proceeding, prejudice the adjudication of the rights of or be duplicative of positions of any existing party; and
>
> (iii) The petitioner's participation may reasonably be expected to assist in the development of a sound record.

46 C.F.R. § 502.72(b)(2).

The Commission has articulated a policy of liberally interpreting Rule 72 to permit intervention of interested parties. *Vessel Sharing Agreements – Order to Show Cause*, 27 S.R.R. 137, 138 (FMC 1995); *NPR, Inc. v. Board of Comm'rs of the Port of New Orleans*, 28 S.R.R. 1007, 1008-1009 (ALJ 1999). With respect to discretionary interventions, the Commission held that to avoid unnecessary prejudices to the parties, the Commission has taken an interest-balancing approach, weighing the apparent benefit to be gained by a petitioner's participation against the burden on other litigants. *Vessel Sharing Agreements*, 27 S.R.R. at 138.

Intervention can be granted subject to limitations on the petitioner's participation in the proceeding.

> In the interests of: (1) Restricting irrelevant, duplicative, or repetitive discovery, evidence or arguments; (2) having common interests represented by a spokesperson; and (3) retaining authority to determine priorities and control the course of the proceeding, the presiding officer, in his or her discretion, may impose reasonable limitations on an intervenor's participation, *e.g.*, the filing of briefs, presentation of evidence on selected factual issues, or oral argument on some or all of the issues.

46 C.F.R. § 502.72(c). *See also NPR v. Board of Comm'rs*, 28 S.R.R. at 1011 (intervention may be granted "under limiting conditions so as to preserve fairness to existing parties").

II. PETITIONS FOR LEAVE TO INTERVENE.

A. Petition by Intermodal Motor Carriers Conference of the American Trucking Association, Inc.

The Intermodal Motor Carriers Conference of the American Trucking Association, Inc. (IMCC/ATA) petitioned for discretionary intervention pursuant to Rule 72(b)(2). (IMCC/ATA

Petition at 2.) IMCC/ATA is an affiliated conference of the American Trucking Association (ATA), a non-profit national trade association for the trucking industry that includes more than 37,000 motor carrier members representing every type and class of motor carrier in the country. (*Id.* at 2.) IMCC/ATA provides educational and training services to the intermodal motor carrier members of the ATA and represents the interests of these members in a broad range of federal, state, local, and industry policy fora. (*Id.* at 2.) Many IMCC/ATA members provide drayage services to and from the Ports. (*Id.* at 2.)

First, IMCC/ATA alleges that its members have "common issues of law or fact" with the subject area of the Commission's investigation. IMCC/ATA members provide or want to provide drayage services at the Ports; therefore, they are precisely the entities most directly affected by the requirements of the CTPs. (*Id.* at 4.) IMCC/ATA contends that the Ports' alleged violations will unlawfully exclude IMCC/ATA members from the ability to provide drayage services at one or both ports, unlawfully impose costs on IMCC/ATA members (*e.g.*, requiring the purchase or lease of off-street parking spaces), unlawfully require restructuring of the manner in which they do business at the Ports (*e.g.*, requiring the use of employee drivers), and/or unlawfully restrict their business flexibility (*e.g.*, preventing the use of independent owner-operators as subcontractors). (*Id.* at 4.)

Second, IMCC/ATA alleges that its positions are not duplicative of those taken by the Ports since IMCC/ATA members are directly and adversely affected by the Ports' actions. (*Id.* at 5.) IMCC/ATA's participation will not expand the scope of the proceeding since IMCC/ATA intends to address only those issues specified by the Commission or the Administrative Law Judge. (*Id.*) IMCC/ATA alleges that since it intends solely to facilitate the investigation and bring it to a rapid conclusion, its intervention will not delay the proceeding. (*Id.*) In this regard, IMCC/ATA does not intend to request discovery, but reserves the right to participate in discovery. (*Id.*)

Finally, IMCC/ATA alleges that its extensive history of assisting the Commission in assessing the Shipping Act issues with respect to the Ports' CTPs demonstrates IMCC/ATA's commitment to "develop a sound record." (*Id.* at 5-7.)

The Ports oppose IMCC/ATA's petition to intervene.[3] The Ports contend that IMCC/ATA's[4] positions would duplicate the positions taken by BOE and that IMCC/ATA's interest would be "served by the formal investigative process in which BOE will act as a prosecutor and will bear the burden of adducing evidence addressing the legality of the Ports' actions." (Ports' Opposition to

[3] The certificate of service accompanying the opposition is dated November 7, 2008, but the opposition was not received by the Commission until November 25, 2008. For the purposes of this motion, I consider the opposition to be timely. 46 C.F.R. § 502.114(c).

[4] Although the Ports identified the proposed intervenor as ATA, I assume they mean IMCC/ATA.

IMCC at 1-2.)[5] The Ports claim that IMCC/ATA's participation will substantially complicate the discovery process. (*Id.* at 3.) The Ports also claim that the presence of non-governmental parties will distort the prosecutorial nature of this proceeding and make the defense approaches more complex. (*Id.* at 3.)

IMCC/ATA members provide or want to provide drayage services to and from the Ports; therefore, this proceeding may directly affect the transactions between the Ports and members of IMCC/ATA. Although the Ports claim that IMCC/ATA's positions and those of BOE are duplicative, BOE's positions are to find possible violations of the Shipping Act to protect the shipping industry in general including the beneficial cargo owners, while IMCC/ATA's positions are primarily to advocate its members' interests. The fact that this is a proceeding in which BOE is seeking enforcement of the Act does not mean that intervention should not be permitted. *See Vessel Sharing Agreements*, 27 S.R.R. at 138-139 (intervention permitted in enforcement action). Further, IMCC/ATA's intervention may not broaden the scope of this proceeding because the Commission already established the scope of the investigation in its Order of September 24, 2008. Finally, IMCC/ATA's intervention can assist in the development of a sound record in that they are in a position to supplement the record with respect to portions of the investigation related to the interests of IMCC/ATA members.

IMCC/ATA has established the elements required for discretionary intervention. Therefore, its petition for leave to intervene is granted pursuant to Rule 72(b)(2) subject to the limitations set forth in Part III below.

B. Petition by Owner-Operator Independent Drivers Association, Inc.

Owner-Operator Independent Drivers Association, Inc. (OOIDA) petitions for leave to intervene as of right pursuant to Rule 72(b)(1) (OOIDA Petition at 1-2), or in the alternative, as a matter of discretion pursuant to Rule 72(b)(2). (*Id.* at 6 n.1.) OOIDA states that it is a trade association representing the interests of independent owner-operator, small business motor carriers, and professional truck drivers. (*Id.* at 2.) OOIDA claims that many of its member truckers need access to the Ports on an intermittent and infrequent basis in order to transport cargo into and out of the Ports. (*Id.* at 3.) The CTPs require all motor carriers that want to enter the Ports to enter into concession agreements, but OOIDA contends that the requirements for the concession agreements are almost impossible for long-haul truckers to meet. The requirement established by the Port of Los Angeles that requires the use of employee drivers further impacts OOIDA members, most of whom are owner-operators. OOIDA states that the Ports' CTPs effectively exclude long-haul out-of-state truckers from the Ports and deny them the financial assistance available to concessionaires for replacement trucks. (*Id.* at 4.) Although OOIDA concedes that its negotiations with the Ports have resulted in a temporary day pass system permitting twelve Port entries per year by "infrequent visitors" before licensing as a concessionaire would be required, OOIDA contends that the Ports are interested in defending the programs that they have adopted and cannot reasonably be expected to

[5] The Ports did not number the pages of their opposition. The allegations appear on the first and second pages of the Opposition.

represent the interests of OOIDA members. (*Id.* at 4-5.) IMCC/ATA[6] appears to represent motor carriers for local drayage operation whose interests differ from those of the long-haul truckers on whose behalf OOIDA seeks to intervene. (*Id.* at 5.) Finally, OOIDA alleges that it has developed a substantial body of factual information and expertise pertinent to the subject matter of this investigation. (*Id.* at 6.)

The Ports oppose OOIDA's intervention either as a matter of right pursuant to Commission Rule 72(b)(1) or as a matter of discretion pursuant to Commission Rule 72(b)(2). (Ports' Opposition to OOIDA at 2.) The Ports contend that OOIDA has not made a "clear and convincing" showing of the elements for an intervention as of right. (*Id.* at 3 and 5.) First, the Ports contend that OOIDA's interest in this proceeding is not substantial, but marginal and tenuous, because OOIDA is primarily comprised of long-haul motor carriers rather than the drayage carriers that serve the Ports on a daily basis. (*Id.* at 3-4.) Second, the Ports contend that OOIDA's intervention would broaden the scope of this proceeding by injecting Commerce Clause issues into it. (*Id.* at 5.) Third, the Ports contend that this proceeding will not materially affect OOIDA's interest because OOIDA's primary concern is CTPs' violations of Commerce Clause, whereas this proceeding concerns certain prohibitions of the Shipping Act. (*Id.* at 6.) Fourth, the Ports contend that the Ports' temporary access permit program for out-of-state motor carriers will ameliorate the harm to OOIDA members. (*Id.)* Finally, the Ports contend that OOIDA's interest will be adequately represented by BOE. (*Id.*) The Ports oppose OOIDA's intervention as a matter of discretion on the basis that (1) OOIDA did not identify a common issue of law or fact, (2) OOIDA's intervention will unduly broaden the scope of this proceeding and prejudice the Ports, and (3) OOIDA's intervention will not assist in the development of a sound record. (*Id.* 7-10.)

OOIDA has not made a clear and convincing showing that it should be permitted to intervene as of right pursuant to Rule 72(b)(1). OOIDA has established that the CTPs may restrict its members' access to the Ports; therefore, a common issue of law or fact exists between the interest of OOIDA and its members and the subject matter of the proceeding. Permitting OOIDA to intervene will not broaden the scope of this proceeding because the Commission already established the scope of the investigation in its Order of September 24, 2008. Finally, the Petitioners may be able to provide assistance in establishing the impact of the CTPs on its members who are located at some distance from the Ports and for whom licensing as a concessionaire is claimed to be impracticable. In view of the foregoing, OOIDA's petition is granted pursuant to Rule 72(b)(2) subject to the limitations set forth in Part III below.

C. Petition by Natural Resources Defense Council, Sierra Club, and Coalition for Clean Air.

Natural Resources Defense Council, Sierra Club, and Coalition for Clean Air (Environmental Petitioners) seek to intervene as of right pursuant to Commission Rule 72(b)(1), or, in the alternative, a discretionary intervention pursuant to Commission Rule 72(b)(2). (Environmental Petitioners'

[6] Although OOIDA identified the other putative intervenor as ATA, I assume that they intend IMCC/ATA.

Petition at 6 and 12.) Neither BOE nor Respondents filed a reply to the Environmental Petitioners' Petition, and it appears that they do not oppose to the Environmental Petitioners' intervention in this proceeding.

The Environmental Petitioners claim that their organizations are dedicated to the protection of the environment and public health and that many of their members live close to the Ports. They further claim they have worked to reduce diesel pollution from the Ports and were actively engaged in the development of the CTPs. (Environmental Petitioners' Petition at 2.) Environmental Petitioners contend that they meet the requirements of Rule 72(b)(1) to intervene as a matter of right. First, they contend that they and their members have significant interest in reducing air pollution generated by the operation of the Ports. The Environmental Petitioners have worked with the Ports for years to attempt to reduce this air pollution. They claim that as public interest groups that helped create the CTPs, they have a right to intervene in this action challenging their legality. They contend that their participation is "particularly important" since the Commission's staff has taken the position that an enforcement action does not trigger the need for an environmental assessment or preparation of an Environmental Impact Statement. Second, Environmental Petitioners contend that the outcome of this proceeding could materially affect their interests. An order requiring the Ports to cease and desist from implementing the CTPs will result in a loss of the health benefits of the CTPs. Third, neither the Ports nor BOE, the only parties to this proceeding, will adequately represent the interests of the Environmental Petitioners. While the Environmental Petitioners want to participate to defend the CTPs, which is consistent with the Ports' position, they contend that the Ports' economic interests may motivate a shift in the Ports' position to one that conflicts with that of the Environmental Petitioners. They point out that they were permitted to intervene in the case brought against the Ports by ATA. *See American Trucking Assoc., Inc. v. City of Los Angeles*, No. CV 08-04920 CAS (Ctx), Civil Minutes - General, at 3 (C.D. Cal. Sept. 4, 2008) (Environmental Petitioners "may not be adequately represented by existing parties, because [the Ports] may be motivated by interests exclusive to the Ports, which could potentially conflict with the interests of [the Environmental Petitioners]").

Environmental Petitioners contend that if they do not meet the requirements to intervene as a matter of right, they meet the requirements to intervene as a matter of discretion as set forth in Rule 72(b)(2). First, they have a significant, direct, and personal interest in the CTPs, the subject of this proceeding. Second, permitting intervention will not interfere with or broaden the issues in this proceeding. Third, the Environmental Petitioners' participation may reasonably be expected to assist in the development of a sound record. (Environmental Petitioners' Petition at 12-14.)

Environmental Petitioners have not made a clear and convincing showing that they should be permitted to intervene as of right pursuant to Rule 72(b)(1). Environmental Petitioners have established that they have common issues of fact with the subject matter of this proceeding in that the outcome of this proceeding can affect implementation of the Ports' CTPs level of air pollution resulting from port-related activities. Permitting Environmental Petitioners to intervene will not broaden the scope of this proceeding because the Commission already established the scope of the investigation in its Order of September 24, 2008. Finally, the Petitioners may be able to provide

assistance in clarifying the Ports' CTPs, the primary goal of which is to address air pollution in the Ports and the adjacent areas. In view of the foregoing, Environmental Petitioners' petition is granted pursuant to Rule 72(b)(2) subject to the limitations set forth in Part III below.

D. Petition by National Association of Waterfront Employers.

Although its petition did not clearly state, it appears that National Association of Waterfront Employers (NAWE) seeks intervention as of right pursuant to Rule 72(b)(1) because the petition addresses only the elements for intervention as of right. NAWE states that it is a trade association representing MTOs and stevedores. NAWE members operate the majority of the marine terminals in the Ports. (NAWE Petition at 1.)[7] NAWE claims that its members have substantial interest in this proceeding in that it will directly impact the operations of its member companies. (*Id.*) NAWE also claims that this proceeding will directly affect NAWE members' operations in the Ports, could have significant impact on other agreements into which NAWE members have entered, and could damage security activities of NAWE members. (*Id.* at 2.) Finally, NAWE alleged that its interest is not adequately represented by existing parties in that the interests of public port authorities are fundamentally different from interests of the private MTOs. (*Id.*)

The Ports oppose NAWE's petition on the ground that NAWE failed to make a "clear and convincing" showing of any of the requirements for an intervention as of right under the Rule 72(b)(1) in that NAWE does not establish a substantial interest, this proceeding will not materially affect NAWE's interest, and NAWE's interest is adequately represented by BOE. (Ports' Opposition to NAWE at 4-6.)

NAWE has not made a clear and convincing showing that it should be permitted to intervene as of right pursuant to Rule 72(b)(1). NAWE has established that it has common issues of fact with the subject matter of this proceeding in that the outcome of this proceeding can affect implementation of the Ports' CTPs and the CTPs provide that marine terminal operator tenants of the Ports are responsible for verification of eligibility and enforcement of the access restrictions to the terminals by trucks and collection of the Clean Truck Fee. Permitting NAWE to intervene will not broaden the scope of this proceeding because the Commission already established the scope of the investigation in its Order of September 24, 2008. Finally, the Petitioners may be able to provide assistance in clarifying the impact of the CTPs on the private marine terminal operators in the Ports. Therefore, NAWE's petition for leave to intervene is granted pursuant to Rule 72(b)(2) subject to the limitations set forth in Part III below.

III. DISCOVERY BY INTERVENORS.

As stated above, Rule 72(c) grants the authority to the presiding officer to impose reasonable limitations on an intervenor's participation in a proceeding. Exercising that discretion, I impose the following limitations on taking of discovery by intervenors:

[7] NAWE did not number the pages in its Petition. The allegation appears on the first page of the Petition.

1. Intervenors may only initiate formal discovery upon motion and authorization by the presiding officer.

2. Prior to filing a motion seeking leave to take discovery, an intervenor shall meet or confer with the party or person from whom it seeks discovery to attempt to acquire the information voluntarily.

3. If the intervenor is unable to obtain the information voluntarily, the intervenor may file a motion seeking leave to take discovery. The motion shall: (a) identify the party or person from whom the information is sought; (b) describe the information sought by the intervenor; (c) state the relevance of the information to the issues raised by the Order of Investigation and Hearing; (d) summarize the intervenor's attempts to obtain the information voluntarily; and (e) set forth affirmatively that the information has not been sought by another party or intervenor. The motion shall include as part of the same document a memorandum of points and authorities supporting the motion. The motion and memorandum shall not exceed 2,000 words. The motion shall include a certificate by the attorney that the memorandum complies with this word limitation. *Compare* Fed. R. App. P. 32(a)(7)(C).

4. If the intervenor seeks the information through the use of interrogatories, requests for production of documents, or requests for admission, in addition to the information required by paragraph 3 above, the intervenor shall attach a copy of the interrogatories, requests for production of documents, or requests for admission to the motion.

5. If the intervenor seeks the information in a deposition that has been noticed by a party, in addition to the information required by paragraph 3 above, the intervenor shall set forth an estimate of the time it will take to complete its interrogation of the witness.

6. The intervenor shall serve its motion and any attachments on the parties and other intervenors by personal service or by facsimile, email, or other electronic means of transmission.

7. A party opposing an intervenor's motion for leave to take discovery may file a memorandum of points and authorities in opposition to the motion. The memorandum shall not exceed 2,000 words. The memorandum shall include a certificate by the attorney that the memorandum complies with this word limitation. *Compare* Fed. R. App. P. 32(a)(7)(C). A party opposing an intervenor's motion for leave to take discovery shall serve and file its opposition within seven calendar days of service of the motion. *See* 46 C.F.R. § 502.103 ("Except as otherwise provided by law and for good cause, . . . the presiding officer, with respect to matters pending before him or her, may reduce any time limit prescribed in the rules in this part.").

Other limitations may be imposed as appropriate.

MOTION FOR STAY

I. ADDITIONAL BACKGROUND.

The Ports have filed a motion to stay this proceeding until the "Commission and [BOE] comply with the National Environmental Policy Act . . . and the Commission's rules . . . which require that the Commission begin preparation of an Environmental Impact Statement . . . when it issues an order of investigation in a proceeding that may have a significant impact upon the environment." (Motion for Stay at 2.) BOE opposes the motion.

The National Environmental Policy Act (NEPA) requires federal agencies proposing any "major Federal actions significantly affecting the quality of the human environment" to prepare an Environmental Impact Statement (EIS). 42 U.S.C. § 4332(2)(C). When it undertakes a major federal action affecting the human environment, an agency prepares an Environmental Assessment (EA) briefly providing "sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact." 40 C.F.R. § 1508.9(a)(1). *See* 46 C.F.R. § 504.5(b) ("A notice of intent to prepare an environmental assessment briefly describing the nature of the potential or proposed action and inviting written comments to aid in the preparation of the environmental assessment and early identification of the significant environmental issues may be published in the FEDERAL REGISTER.").[8] If the Commission determines after the EA that a potential or proposed action will not have a significant impact on the quality of the human environment, then it prepares a finding of no significant impact and publishes notice of its availability in the Federal Register. 46 C.F.R. § 504.6(a). "An [EIS] shall be prepared when the [EA] indicates that a potential or proposed action may have a significant impact upon the environment of the United States or the global commons." 46 C.F.R. § 504.7(a)(1).

The NEPA regulations promulgated by the CEQ provide that:

> (b) Federal actions tend to fall within one of the following categories:
>
> (1) Adoption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*; treaties and international conventions or agreements; formal documents establishing an agency's policies which will result in or substantially alter agency programs.

[8] Title 40 C.F.R. Parts 1500-1508 codifies the regulations promulgated pursuant to NEPA by the Council on Environmental Quality (CEQ), Executive Office of the President (the NEPA regulations). *See* 43 Fed. Reg. 56002 (Nov. 29, 1978). Title 46 C.F.R. Part 504 codifies the Commission's regulations promulgated pursuant to NEPA. *See* 49 Fed. Reg. 44415 (Nov. 5, 1984).

(2) Adoption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of Federal resources, upon which future agency actions will be based.

(3) Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.

(4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.

40 C.F.R. § 1508.18(b).

Certain categories of actions are excluded from the requirement to prepare an EA and/or EIS.

Categorical exclusion means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (§1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required

40 C.F.R. § 1508.4. *See also* 40 C.F.R. § 1508.18(a) (major Federal actions "do not include bringing judicial or administrative civil or criminal enforcement actions"). Pursuant to this authority, Commission regulations establish certain categorical exclusions from the requirement to prepare an EA and an EIS.

No environmental analyses need be undertaken or environmental documents prepared in connection with actions which do not individually or cumulatively have a significant effect on the quality of the human environment because they are purely ministerial actions or because they do not increase or decrease air, water or noise pollution or the use of fossil fuels, recyclables, or energy. The following Commission actions, and rulemakings related thereto, are therefore excluded: . . . (22) Investigatory and adjudicatory proceedings, the purpose of which is to ascertain past violations of the Shipping Act of 1984.

46 C.F.R. § 504.4(a).

The Commission did not prepare an EA or an EIS before it issued the Order of Investigation and Hearing that commenced this proceeding. On October 14, 2008, the Natural Resources Defense Council, Coalition for Clean Air, and Sierra Club (Environmental Petitioners) filed a petition with the Commission asking that the Commission "conduct any and all environmental analysis required by federal law before taking any action that would interfere with the full implementation of the Port

of Los Angeles and Long Beach's Clean Trucks Program." (Petition of [Environmental Petitioners] Related to Federal Maritime Commission Evaluation and Actions on the Ports of Los Angeles and Long Beach's Clean Trucks Programs at 2 (Attachment A to the Ports' Motion for Stay).) *See* 46 C.F.R. § 504.4(b) ("If interested persons allege that a categorically-excluded action will have a significant environmental effect . . . , they shall, by written submission to the Secretary, explain in detail their reasons. The Secretary shall refer these submissions for determination by the appropriate Commission official, not later than ten (10) days after receipt, whether to prepare an environmental assessment."). The Environmental Petitioners contend that an action taken by the Commission to halt, delay, or interfere with the Clean Trucks Program will violate NEPA, the Clean Air Act, and the Energy Policy and Conservation Act of 1975 since the Commission

> has not performed the requisite environmental analysis under those statutes prior to taking such action. Accordingly, Environmental Petitioners request that the Commission delay any action that may interfere with the ports of Los Angeles and Long Beach's Clean Trucks Program until the requisite environmental analysis are complete. At a minimum, the Commission should delay any action that may interfere with the Clean Trucks Program until it determines whether its legal obligations under the aforementioned environmental statutes have been triggered.

(*Id.* at 2-3.)

On October 23, 2008, the Commission's Secretary responded by letter acknowledging receipt of the Petition. The Secretary stated that:

> While the Commission has not in fact determined what action it would propose to take in its consideration of FMC Agreement No. 201170-001, an action to enforce the Shipping Act, including any action under section 6(g) or section 10 thereof, does not trigger the requirement to conduct an environmental assessment or a requirement to prepare an Environmental Impact Statement.

(Letter dated October 23, 2008, from Secretary to Mr. David Pettit (Attachment B to the Ports' Motion for Stay).) On October 25, 2008, the Environmental Petitioners filed an appeal of the Secretary's decision. (Appeal of Federal Maritime Commission Staff's Denial of Petition of [Environmental Petitioners] Related to Federal Maritime Commission Evaluation and Actions on the Ports of Los Angeles and Long Beach's Clean Trucks Programs (Attachment C to the Ports' Motion for Stay).) *See* 46 C.F.R. § 504.4(b) ("Upon a determination not to prepare an environmental assessment, [the interested persons alleging that a categorically-excluded action will have a significant environmental effect] may petition the Commission for review of the decision within ten (10) days of receipt of notice of such determination."). The Commission has not yet issued a determination on the petition for review of the determination set forth in the Secretary's letter.

II. MOTION FOR STAY.

The Ports contend that

> [a]llowing this case to go forward in the face of the ongoing failure by [BOE] to acknowledge and comply with NEPA and Part 504 would result in a legally flawed and incomplete administrative record and decision. Moreover, it would materially harm Respondents' ability to gather evidence and appropriately respond to the allegations of unreasonable or unlawful conduct raised in the order of investigation. In addition, it would significantly harm the public interest in allowing the Cities [*sic*] underlying public health and environmental programs to take effect without delay or disruption.

(Motion for Stay at 2-3.) They argue that consideration of the four-part interest-balancing standards set forth in *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir.1958), justifies a stay.

BOE first argues that this proceeding is not a major Federal action as defined by section 1508.18 of the NEPA regulations. Second, it argues that issuance of an order of investigation and hearing is categorically excluded from the EA/EIS requirement by section 1508.4 of the NEPA regulations and section 504.4(a)(22) of the Commission's regulations.

The Supreme Court has held:

> [T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance. True, the suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else. Only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both.

Landis v. North American Co., 299 U.S. 248, 254-255 (1936) (citations omitted), quoted in *South Carolina Maritime Services v. South Carolina State Ports Auth.*, 28 S.R.R. 1489, 1490 (ALJ 2000). *See also Cherokee Nation of Oklahoma v. United States,* 124 F.3d 1413, 1416 (Fed. Cir. 1997) ("The power of a federal trial court to stay its proceedings, even for an indefinite period of time, is beyond question. This power springs from the inherent authority of every court to control the disposition of its cases.").

> The factors to be considered in determining whether a stay is warranted are: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal;

> (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay.

Wisconsin Gas Co. v. FERC, 758 F.2d 669, 673-674 (D.C. Cir. 1985), citing *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir.1958). *See Western Overseas Trade and Dev. Corp. v. Asia North America Eastbound Rate Agreement*, 26 S.R.R. 1382, 1383-1384 (FMC 1994) (adopting *Virginia Petroleum Jobbers* standards for stay pending appeal).

The consideration of the factors on a motion for stay is left to the sound discretion of the administrative law judge. *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 773 (1968); *Landis v. North American Co.*, 299 U.S. at 254; *Cherokee Nation of Oklahoma v. United States,* 124 F.3d at 1414; *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844-845 (D.C. Cir. 1971). The party seeking the stay has the burden of demonstrating that a stay of the proceedings should be entered. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Cuomo v. United States Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985).

(1) Have the Ports made a strong showing that they are likely to prevail on the merits?

The claim on which the Ports must show they are likely to prevail is their contention that NEPA, its regulations, and the Commission's regulations promulgated pursuant to NEPA "require that the Commission begin preparation of an Environmental Impact Statement . . . when it issues an order of investigation in a proceeding that may have a significant impact upon the environment." (Motion for Stay at 2.) Neither the Ports' Motion for Stay nor the Environmental Petitioners' petitions filed with the Commission argue that the issuance of an order of investigation and hearing fits within one of the categories of actions set forth in section 1508.18(b) of the NEPA regulations quoted above.

> The Ports contend that the categorical exclusion provided by section 504.4(a)(22)
>
> only applies to "investigatory and adjudicatory proceeding, the purpose of which is to ascertain past violations of the Shipping Act." (emphasis added.) That exemption is clearly inapplicable in this case, inasmuch as the order of investigation is focused on prospective conduct of the Ports, rather than violations that occurred solely in the past.

(Motion for Stay at 5, *quoting* 46 C.F.R. § 504.4(a)(22) (emphasis in Motion for Stay).) The Ports' contention that the Order is focused on prospective conduct of the Ports, not a violation of the Act that occurred in the past, is based on the fact that the Order was issued on September 24, 2008, while that CTPs did not take effect until October 1, 2008, and that the contested fees, incentives, and phasing-in of the requirement for the use of employee drivers have not yet been put into effect. *(Id.)* "Taken as a whole it is clear that the Order . . . represents an FMC effort to review, modify or block and impending future implementation of a major local environmental initiative, rather than a simple

investigation or [*sic*] past unlawful activities." (*Id.* at 6.) The Ports further contend that even if the Order fits within the section 504.4(22) categorical exclusion, an EA is required by section 504.4(c). *See* 46 C.F.R. § 504.4(c) ("If the individual or cumulative effect of a particular action otherwise categorically excluded offers a reasonable potential of having a significant environmental impact, an environmental assessment shall be prepared."). The Order itself recognizes that "[t]he CAAP is a broad effort aimed at significantly reducing the health risks posed by air pollution from port-related ships, trains, drayage trucks, terminal equipment and harbor craft by at least 45 percent in five years." Order of Investigation and Hearing at 1. Therefore, the Ports contend, "[t]here can be no reasonable dispute in this proceedings [*sic*] that the Ports Clean Truck Program (and FMC efforts to impede it, in whole or part) have a significant impact on the environment." (Motion for Stay at 6.)

The Ports have not made a strong showing that they are likely to prevail on their claim that the Commission violated NEPA when it issued the Order without having prepared an EA and an EIS. First, the Ports have not made a strong showing that they can establish that the Order is a "major Federal action" as defined by 42 U.S.C. § 4332(2)(c) and 40 C.F.R. § 1508.18(b). Second, they have not made a strong showing that they can establish that the Order is not categorically excluded by 46 C.F.R. § 504.4(22). Therefore, they have not met their burden on this factor.

(2) What is the likelihood that the Ports will be irreparably harmed absent a stay?

The Ports recognize that it is their burden to establish that they will be irreparably harmed if a stay is not granted. (Motion for Stay at 3.) They contend that:

> The ongoing refusal to initiate the EIS process deprives both the Respondents and the Presiding Officer of the valuable public input and intensive environmental analysis that NEPA requires. Inasmuch as the instant proceeding turns on the "reasonableness" of Respondents' practices under the Shipping Act (with the attendant weighing of benefits and burdens), a full analysis and exposition of the environmental imperatives at stake is indispensable to the rendering of an [*sic*] lawful and reasoned decision.

(*Id.* at 7.) They neither argue nor establish that the harm they claim would be irreparable. (*Id.* at 6-7.)

Even if it were ultimately to be determined that preparation of an EA and/or an EIS is required by NEPA, it is clear that the Ports cannot establish that they will be irreparably harmed if this proceeding is not stayed until "the Commission begin[s] preparation of an [EIS]." (*Id.* at 1.) First, unless and until the Commission issues a final decision finding that the CTPs violate the Shipping Act and issues "appropriate cease and desist orders," Order of Investigation and Hearing at 9 (¶ 9), the CTPs will remain in effect. Second, the Ports' argument assumes that the Commission was required to prepare an EIS before it issued the Order of Investigation and Hearing. As set forth above, the Ports have not established this proposition. Third, in a proceeding assigned to an

administrative law judge, Commission regulations require submission of a final EIS before the close of the record. 46 C.F.R. § 504.7(c)(3) ("For any Commission action which has been assigned to an ALJ for evidentiary hearing: (i) The FEIS shall be submitted prior to the close of the record, and (ii) The ALJ shall consider the environmental impacts and alternatives contained in the FEIS in preparing the initial decision."). If, upon its review of the determination set forth in the Secretary's letter of October 23, 2008, the Commission determines that an EIS is necessary for this proceeding, deadlines for discovery and submissions could be adjusted (if necessary) to permit gathering and submission of evidence related to and preparation of the EIS prior to the presiding officer's Initial Decision. Therefore, the Ports have not met their burden of establishing that they will be irreparably harmed if this proceeding is not stayed until the Commission begins preparation of an EIS.

(3) What is the prospect that others will be harmed if the stay is granted?

The Ports contend that there would be no harm to BOE or to the Commission from granting the stay. "Any initial decision rendered without consideration of a Final EIS would be flawed and unenforceable in any event. Accordingly, proceeding at this point without an EIS would be a misuse of public resources, both the Commission's and the Cities.' [*sic*]" (Motion for Stay at 2-8.) The Ports do not address interests of entities such as some of the intervenors in this proceeding that may be substantially harmed if it is ultimately found that the CTPs violate the Shipping Act. The Ports have not met their burden on this factor.

(4) Where lies the public interest regarding the stay?

The Ports contend that the public interest will be harmed if this proceeding is not stayed. The CTPs are designed to reduce air pollution in the Los Angeles/Long Beach area.

> [T]he Cities of Los Angeles and Long Beach are facing an urgent public health crisis. California's South Coast Air Quality Management District . . . is a "severe" non-attainment area for National Ambient Air Quality Standards for both ozone and particulate matter as established by the United States Environmental Protection Agency. The Ports are a significant contributor to these elevated levels of pollutants, which are directly linked to elevated levels of cancer deaths and other illnesses in the region. The very real threat that the FMC would undermine and obstruct the Cities [*sic*] efforts to deal with this urgent public health crisis without undertaking an examination under NEPA of the environmental consequences of the agency's actions poses a grave threat to the public interest.

(Motion for Stay at 8-9.)

In this case, there is more than one "public interest" to consider. *See Cuomo v. United States Nuclear Regulatory Comm'n*, 772 F.2d at 978 ("[t]he public interest may, of course, have many faces"). While the public has an interest in enforcement of NEPA, it also has an interest in enforcement of the Shipping Act, an interest that the Ports do not address in their motion. Therefore,

the Ports have not met their burden of establishing that the public interest would be served by staying this proceeding.

The Ports have not met their burden of establishing that this proceeding should be stayed until the Commission begins preparation of an Environmental Impact Statement. Therefore, the Motion for Stay is denied.

ORDER

Upon consideration of the petitions for leave to intervene filed by Intermodal Motor Carriers Conference of the American Trucking Association, Inc.; the Owner-Operator Independent Drivers Association, Inc.; the Natural Resources Defense Council, Sierra Club, and Coalition for Clean Air (jointly); and the National Association of Waterfront Employers, Respondents' oppositions to the petitions, and for the reasons stated above, it is hereby

ORDERED that the petitions for leave to intervene filed by Intermodal Motor Carriers Conference of the American Trucking Association, Inc.; the Owner-Operator Independent Drivers Association, Inc.; the Natural Resources Defense Council, Sierra Club, and Coalition for Clean Air (jointly); and the National Association of Waterfront Employers be **GRANTED**. It is

FURTHER ORDERED that any intervenor that wants to initiate discovery follow the procedures set forth in **DISCOVERY BY INTERVENORS** above.

Upon consideration of the Motion for Stay filed by Respondents, the Bureau of Enforcement's opposition thereto, and for the reasons stated above, it is hereby

ORDERED that the Motion for Stay be **DENIED**.

Clay G. Guthridge
Administrative Law Judge